

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1080

In The
United States Court of Appeals
For the Second Circuit

BPK

UNITED STATES OF AMERICA,

Appellee.

v.

SAMUEL MOSCHIANO,

Appellant.

BRIEF OF THE APPELLANT
SAMUEL MOSCHIANO

Submitted by

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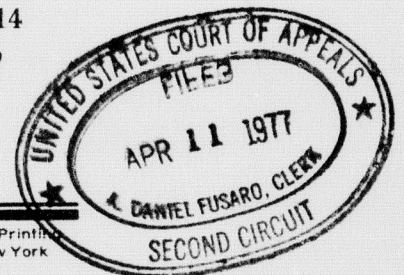


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STATUTES

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QUESTIONS PRESENTED

1. Was there, in the first instance, sufficient proof, as a matter of fact or law, of the actual transactions underpinning count one of the indictment?

Answer: The lower court held that there were.

2. Prior to his appearance at the grand jury, was the interrogation to Mr. Moschiano so complete and explicit that he had related a series of events about which it could be said that later testimony would have set up a contradictory version such as permit a trial jury to decide that there were two conflicting versions of the facts and that the defendant had committed perjury.

Answer: The lower court held that there was a consistency to the statements made prior to Mr. Moschiano's appearance for the grand jury such as would permit the jury to consider that Mr. Moschiano had given two irreconcilable versions of the facts.

3. Were the questions which were asked by the United States Attorney conducting the grand jury interrogation of Mr. Moschiano so clear and unambiguous that they were susceptible of only one meaning?

Answer: The lower court held that they were.

4. Did that same United States Attorney sufficiently examine and pin down Mr. Moschiano so that his answers could leave no doubt in a trial jury's mind that it was his intent to perjure himself in front of that grand jury?

Answer: The lower court held that the questions asked were sufficient to draw that conclusion.

5. Did Mr. Moschiano's answers prevent the grand jury from, at a minimum, exploring other fruitful leads?

Answer: The lower court held that they did.

6. Were Mr. Moschiano's answers such as to have a tendency to impede to prevent the grand jury from proceeding in the performance of its duties?

Answer: The lower court held that they did.

7. Were the questions themselves relevant to the grant of power to investigate under which the grand jury was operating?

Answer: The lower court held that they were proper.



F A C T S

On January 25, 1977, the Hon. John T. Elfvin, sentenced the appellant, SAMUEL J. MOSCHIANO, to a term of three years in jail after a jury, seated in the Western District of New York, found him guilty of one count of perjury (acquitting him on the second count of a two count indictment) committed before a United States Grand Jury in the Western District of New York on October 9, 1975, in violation of 18 U.S.C. 1623.

In July, 1969, the appellant purchased real property, situate at 884 Emerson Street, Rochester, New York, from Patrick Marrocco. Mr. Marrocco stayed in possession of the property, as a tenant, operating his nightclub known as the "Club El Marrocco" (and at some later point renamed the Nickelodeon) until January 26, 1970 when a fire destroyed the building.

During the early part of 1975, a police informant, Angelo Monachino, told the police that the building had been burnt as a result of arson. He said that

Marrocco had made arrangements for the fire because he was in debt and wished to obtain the fire insurance proceeds. It was his understanding that Mr. Marrocco was to pay 25% of the total fire insurance proceeds to the people starting the fire (euphemistically referred to as "the farm") by giving these monies to Vincent Rallo, the insurance broker procuring the insurance on the Emerson Street property.

On June 18 and 19, 1975, well after five years had elapsed from the date of the fire, Mr. Moschiano was called to the Monroe County (New York) Sheriff's Department to be interrogated about his knowledge of these events. Mr. Monachino had indicated that Mr. Moschiano did not procure the burning of the property but that he had knowledge of many of these details.

Present at the Monroe County Sheriff's Department and actively participating in the interview were Deputy Sheriffs John Kovack, William B. Marks, George P. Chace and Special Agent Kenneth R. Olson of the Federal Bureau of Investigation, acting as liaison and coordinating

with the United States Strike Force.

The interview on June 18, 1975, was purfunctory and did not involve any significant interrogation. On June 19, 1975, Mr. Moschiano was interrogated by Sheriff's Deputies Marks and Kovak, Mahoney and Special Agent Olson.

Mr. Moschiano was seated in a room with each of these people present all of whom proceeded to ask questions of Mr. Moschiano. No electrical or mechanical recording was made of this interview. Rather, a summarization of what the law enforcement personnel thought had been resolved was reduced into a statement form which Mr. Moschiano signed. The statement was prepared by the Monroe County Sheriff's personnel and Special Agent Olson was not present at the time that it was signed.

A close examination of this statement, government exhibit 4 A, does not indicate who asked which questions and whether they were leading or not.

In this statement, it appears that Mr. Moschiano indicated that he knew that Marrocco,

was in financial straits and that he decided to resolve those problems by arranging for the Emerson Street property to be burned. It further appeared that Moschiano was advised that the fee for these services would be 25% of the insurance proceeds. After the fire, it appeared that there was pressure from the arsonists who paid the proceeds and arranged for the insurance payoff.

Mr. Moschiano appears to have stated that in 1971 the insurance company settled the claim with he and Marrocco, that the checks were distributed and that Vincent Rallo took \$27,000.00 of the fire insurance proceeds from Marrocco and \$12,000.00 of the proceeds from Moschiano to pay the arsonists.

Some time in August, 1975, (the date is uncertain) Mr. Moschiano was advised that he would be summoned before a United States Grand Jury to testify. Mr. Baldwin, the United States Attorney, was advised that Mr. Moschiano would not testify unless he received immunity. Subsequently, on September 25, 1975, after obtaining proper permission, Mr. Baldwin had the Hon. Harold P. Burke sign an

order granting Mr. Moschiano immunity.

On that same date, Mr. Moschiano indicated that he would not testify at the grand jury and he was immediately remanded to jail where he remained until October 9, 1975 when he agreed to testify before the grand jury.

Although Mr. Moschiano, at the time of his appearance, was advised of the consequences of giving false testimony^{and}, was told that he was not a target of the investigation, he was not in any way told what it was that this grand jury was investigating.

Thereafter, Mr. Baldwin proceeded to interrogate Mr. Moschiano, in great detail, about Mr. Moschiano's conversations with the various police personnel, reduced to writing in exhibit 4 A.

Mr. Moschiano then repudiated that statement. In part he said the statement was coerced. The pressure of a lengthy interrogation and his desire to get it all over with caused him to say what he said. In part he asserted, that the questions were leading and the words were put into his mouth.

Specifically, he told the grand jury that he had never told Olson that Marrocco had given \$27,000.00 of the insurance proceeds to Rallo and that Olson had put these words into his mouth (count one of the indictment).

He denied telling Olson that he had any conversations with Marrocco about the arson or the 25% fee (count two, of which Mr. Moschiano was acquitted).

Thereafter, the government indicted Mr. Moschiano for lying to the grand jury alleging, in substance, that Mr. Moschiano had made perjurious statements to Special Agent Olson.

At the trial, the government produced each of the witnesses who were present in the Monroe County Sheriff's Office on June 19, 1975. They testified as to the making of Mr. Moschiano's statement, exhibit 4 A, and gave their recollections of the interrogation. Mr. Baldwin and the assistant foreman of the grand jury and the court reporter at the grand jury testified as to those proceedings. The only witness testifying as to the underlying facts themselves was Angelo Monachino.

His testimony related solely to the matters contained in count two (the count which the jury acquitted on).

There was no testimony as to the underlying facts, if any, surrounding count one by any witness. Mr. Moschiano's testimony was consistent with his grand jury testimony repudiating the earlier statement. There was no testimony as to the exact scope and purpose of the grand jury convened for the purposes of hearing Mr. Moschiano's testimony. There was little, if any, testimony concerning whether the statements of Mr. Moschiano were material (i.e. relevant) and there was no testimony indicating that those statements had any tendency to impede the grand jury from proceeding in the performance of its duties or that the grand jury was prohibited or prevented from examining any other leads.

POINT I

AS A MATTER OF LAW,
THE GOVERNMENT FAILED
TO PROVE THAT MR.
MOSCHIANO LIED TO THE
GRAND JURY

A. APPELLANT'S STATE-
MENTS WERE NOT MATERIAL
AS THERE WAS NO PROOF
AS TO THE FACTS UNDER-
PINNING THEM

Section 18 U.S.C. 1623 (A) provides, in part
that:

Whoever under oath at any pro-
ceeding before...any Grand Jury
of the United States knowingly
makes any false material declara-
tion...shall be fined...or im-
prisoned...

There was no proof that the underlying facts,
alleged in count one of the indictment, actually
existed. The proof at trial consisted of a comparison
of two separate statements made solely by Mr. Moschiano
without any other proof to establish the reality
of the facts or the inconsistency of appellant's testimony.
Unlike other cases, there was insufficient proof of
materiality and, inconsistency, if there was any, could
not rise to the level of perjury.

At a trial, truly inconsistent versions are given to a jury for their consideration. Thus, in U.S. v. Turcotte, 515 F 2d 145 (CA 2 1975),¹ the government had tape recorded conversations of appellant's meetings with, among others, a government informant. Among other things, Turcotte indicated how he would fabricate his grand jury testimony which, ultimately, "...was amazingly similar to the story that seemed to have been concocted at [that] meeting." (515 F 2d 145, 148-149.)

In other cases which this court has had to consider, the perjury defendant has made unrecorded statements to another witness who has testified to the contents of them, see, e.g. U.S. v. Swieg, 441 F 2d 114 (CA 2 1970) cert. den. 403 U.S. 932, 91 S. Ct. 2256, 29 L.Ed. 2d 711 (1971).

Here, we have no evidence of a documentary nature, such as a ticket serial number on a winning trifecta ticket that is so unique that it can be traced to a particular sale with exact specificity, see e.g. U.S. v. Pinto, 503 F 2d 718 (CA 2 1974).

1 Cert. Den. 423 U.S. 1032.

In some cases there are photographs of individuals at meetings which show that their claimed non-presence is infact a lie, see, e.g. U.S. v. Camporeale, 515 F 2d 184 (CA 2 1975) or U.S. v. Tramunti, 500 F 2d 1334 (CA 2 1974) cert. den. 419 U.S. 1079.

In the instant case, Mr. Moschiano took the position that his prior statements, to the police , were wrong, erroneous or false. At the conclusion of the grand jury proceedings, it may be said that, at worst, Mr. Moschiano was evasive, or less than candid when he had first been interviewed on June 19, 1975. However, that in itself is not proof of lying to Special Agent Olson or lying to the grand jury.

In order to prove the allegations of count one, then, the government would have to prove the underlying truth or falsity of the declaration "...Rallo received Twenty-Seven Thousand Dollars from Marrocco [sic] (indictment count one).
Thus, the government would have to show

that there had been an insurance policy covering the Emerson Street property, that a claim had been made upon it, that the claim had been paid, that \$27,000.00 from the proceeds had been handed to Mr. Rallo and that Mr. Moschiano was present or knew about that transfer of monies.

There was no such testimony at the trial and presumably there was no such testimony before the grand jury. There were no checks or documents produced that would in any way indicate what the underlying facts were. Even to assume, arguendo, that Mr. Moschiano had unambiguously taken two distinct positions, there is no proof of the underlying fact itself.

Since there was no proof of the underlying truth against which the government wished to show that conflicting versions had been uttered, the statements were not material within the meaning of the statute. The court below ought to be reversed and the indictment dismissed upon based ^{upon} of the similarity of this case, to U.S. v.

Mancuso, 485 F 2d 275 (CA 2 1973).

There, this court said:

We are required to examine both the nature of the inquiry at which the testimony was given and the evidence introduced to trial to prove its falsity, in order to determine whether a truthful answer could conceivably have aided the grand jury investigation.

485 F 2d 275, 280-281.

In that case, Carmen Laraiso, appeared before a United States Grand Jury and testified that Mancuso, had helped to falsify certain corporate records to conceal a bribe to a City of Batavia, New York, official.

Mancuso, appeared in front of that same grand jury and denied having any knowledge of the falsification.

At the trial, Laraiso, on cross-examination, repudiated his grand jury and trial testimony. He stated that the particular records relating to the bribe of a city councilman actually re-

lated to a different transaction this had nothing to do with the particular racketeering investigation which had been the main subject of inquiry of this particular grand jury.

The remaining defense witnesses all testified to the same thing. This court concluded that even though Mancuso may have lied, that he could not have committed perjury because the transaction which he lied about had nothing to do with the grand jury investigation. This court concluded:

A finding of materiality must have some basis in the content of the testimony itself. That which is otherwise wholly immaterial cannot become material solely because a prior witness innocently but mistakenly led on by the prosecutor, has given the false or erroneous impression that it has some materiality.

485 F 2d 275, 282.

In the instant case, that can probably be rephrased by taking out the words "a prior witness" and substituting the words "this witness".

Mr. Baldwin, the United States Attorney,
conducting that grand jury investigation, testified that at the time that it called Mr. Moschiano,
that:

The grand jury was investigating a series of fires, which were recently believed to have been arsons. It was conducting an investigation pursuant to section 1341 of Title 18, United States Code, relating to mail fraud, and to section 1962 of Title 18, the United States Code, relating to the use of an organization or business for certain unlawful purposes.

(Transcript p302f15)

Mr. Baldwin went on to testify that one of the alleged arsons which he investigated was one which allegedly occurred at the El Marrocco (p303f4).

Thereafter, Mr. Baldwin attempted to testify as to the materiality of Mr. Moschiano's testimony for the grand jury. After objection by defense counsel, the court took over the questioning of Mr. Baldwin and elicited from him the following response:

It was material to the grand jury's investigation, your honor, to determine that this being an arson, who would set the fire and for what purpose, and what the financial arrangements had been in setting the fire. In other words, who had paid? It was partially for that reason that Mr. Moschiano was called before the grand jury to inquire of these matters. By stating, first of all, that he did not say to Special Agent Olson that Mr. Marrocco paid Mr. Rallo the sum of Twenty-Seven Thousand Dollars, and, secondly by saying that he did not know anything about any money being paid by Mr. Marrocco to Mr. Rallo, he, in effect, set up a... [the witness was cut off by the court at that time]

(Transcript p305f1 et. seq.)

The original test of materiality required that the false statements have:

A natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation:

Carroll v. U.S., 16 F 2d 951,
(CA 2 1927) cert. den.
273 U.S. 763, 47 S. Ct. 477,
71 L.Ed. 880 (1927).

In U.S. v. Freedman, 445 F 2d 1220
(CA 2 1971), this court further refined that
definition to force the government to prove:

...That a truthful answer would
have been of sufficient probative
importance to the inquiries of
that, as a minimum, further
fruitful investigation would
have occurred.

445 F 2d 1220, 1227.

In that case, the Securities Exchange
Commission was looking into securities laws of
violations.

This court held that the Securities
Exchange Commission was acting in an adjudicative
function and that the scope of the issues which
were before it were more narrowly defined than
the grand jury function which is primarily
investigative and can take in a wider
scope of inquiry.

As in Mancuso, supra, it is respectfully
submitted that there can be no showing that
the grand jury was disrupted using either test

because of the failure of the underlying proof.

Even if this court were to assume, in some way, that the underlying factual transactions were proven, defendant's guilt has not been proven as there is no testimony by any witness ^{their} as to [^] effect on the grand jury.

Mr. Baldwin made an attempt to do so and was summarily prevented from doing so by the judge (Transcript page 305, supra). There being no proof of the underlying transaction, no proof of the disruption of the grand jury, the perjury conviction must be reversed.

B. THE QUESTIONING
WAS INCOMPLETE; THE
QUESTIONS THEMSELVES
WERE AMBIGUOUS AND
SUSCEPTIBLE OF SEVERAL
MEANINGS

The June 19, 1975 interrogation was not recorded electronically or stenographically. A close examination of that statement, Government Exhibit 4 A,² reveals that it bears no resemblance to the process which was described by the witnesses.

Based upon the trial testimony, it appears that several people were asking questions and that these questions and these answers were then being edited and retranscribed into statement form by some other detective. There is a great deal of ambiguity with respect to the question and answer technique itself. No one specifically testified that all of the questions either required a narrative on the part of the witness or were leading questions requiring a yes or no answer.

2. Government Exhibit 4 A, less redactions, is reproduced in Appendix #2.

It was Mr. Moschiano's claim that it was such a leading question that permitted the \$27,000.00 figure to be mentioned.

Special Agent Olson testified on cross-examination as follows:

Q. Did you also have information to the effect that \$27,000.00 was paid to Vincent Rallo?

A. I don't know that I had the figure.

Q. You had the figure certainly before you talked to my client Mr. Moschiano, did you not?

A. I may have sir, I would have to refresh my recollection.

(Transcript pl07f21 - pl08f1)

On redirect examination, Agent Olson was asked to examine his 302 form (not in evidence) containing his notes of his interview with Angelo Monachino and thereafter the following examination ensued between Mr. Olson and Mr. Perry:

Q. Now, having examined this report of interview, can you tell us, please, whether or not Mr. Monachino advised you on that occasion if Patrick Marrocco paid \$27,000.00 to Vincent Rallo for the arson at 880 Emerson Street?

A. I don't recall that, no sir.

Q. ...Were there any other times when you were advised prior to interviewing Mr. Moschiano on June 19, 1975?

A. No, sir.

Q. You were not advised of the \$27,000.00 figure, is that correct?

A. That is correct.

Q. When you questioned Mr. Moschiano on June 19, 1975, did you tell him that Patrick Marrocco had paid \$27,000.00 to Vincent Rallo?

A. No, sir.

Q. He told you, is that correct?

A. Yes, sir.

Q. Did anyone else in your presence tell Mr. Moschiano that Patrick Marrocco had given \$27,000.00 to Vincent Rallo in payment for the arson?

A. No, sir.

(Transcript pl23f22 - pl24f18)

There was no proof as to what Mr. Moschiano may have been advised of by one of the other interrogators. On June 19, 1975, he may very well have been advised of it or he may have read it or some other thing may have occurred which would have brought this to his attention.

At the very outset, then, there was no proof that appellant had this knowledge.

This was compounded by the inarticulate questioning of appellant in the grand jury and at trial. It is settled that in our adversarial system the responsibility for explicitly framing questions which will conclusively demonstrate that perjury was committed, is the questioners' and not the witnesses'.

The United States Supreme Court in considering a prosecution under 18 U.S.C. 1621 considered this problem and dealt with it in Bronston v. United States, 409 U.S. 352, 93 S. Ct. 595, 34 L.Ed. 2d 568 (1973).

There, it was undisputed that Mr. Bronston's answers were literally truthful when he was asked the following questions:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there, for about six months in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.
Q. Have you ever?
A. No, sir.

409 U.S. 352, 354.

The answer to the second question was literally true except that he was not entirely responsive. The Court stated:

The words of the statute (18 U.S.C. 1621) confine the offense of the witness who "willfully...states any material matter which he does not believe to be true."

. . .

The statute does not make it a criminal act for a witness to willfully state any material matter which implies any material matter that he does not believe to be true.

409 U.S. 352, 357-358.

The Court held that it was not the intent of Congress to:

...intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert...to the incongruity of petitioner's unresponsive answer.

409 U.S. 352, 358

The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner--so long as the witness speaks literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

409 U.S. 352, 360

Although 18 U.S.C. 1621 uses the word "willfully" and 18 U.S.C. 1623 uses the term "knowingly makes any false material declaration" it is respectfully submitted that these terms are interchangeable because of their definitions:

An act is ^{done} willfully if done voluntarily [^] and intentionally, and with a specific intent to do something the law forbids; that is to say, with that in purpose I would disobey or disregard the law.

Devitt and Blackmar, Federal Jury Practice and Instructions, Third Edition, page 384, Volume I.

A statement or act or omission is knowingly made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Devitt and Blackmar, Federal Jury Practice and Instructions, Third Edition, page 452, Volume I.

A close examination of the questions propounded by Mr. Baldwin, are ambiguous. At the outset, Mr. Baldwin referred to an interview by Special Agent Olson when in fact Special Agent Olson was one of the several interrogators who were questioning the defendant at the same time.

At no time was Mr. Moschiano handed government exhibit 4A and interrogated about its contents word for word. Government's exhibit 4 A and Agent Olson's interrogation was treated as though they were two separate events occurring at different times and different places.

Q. You never made any such statement, you never made any such indication that Marrocco [sic] had given that money to Rallo?

A. No, sir, never.

(Indictment Count One)

That question was compound in form and capable of a double meaning especially in view of the confusion which the witness had registered previously. At that point, it was up to the interrogator to proceed further as is indicated

in the doctrine of Bronston v. U.S., supra.

Q. If that statement was made to you by anybody else, did you nod your head or agree or state yes that is right?

A. No, sir, never.

Indictment Count One

The question consisted of three parts and was confusing because there was no reflection that the interview was videotaped and hence there would be no record of whether Mr. Moschiano nodded his head or not.

Even to conclude, arguendo, a position which Mr. Moschiano does not take, that it was his intent to mislead, he still cannot be punished as it is the interrogator who must ask the question.

The instant case may be readily distinguished from one which was recently decided by this court, United States -vs- Bonacorsa, 528, F 2d 1218 (CA 2 1976), cert. den. ____ U.S. ____ (1976).

A close examination of the questions asked the defendant there shows a pattern of questioning relating exhibits and depositions to testimony, 528 F 2d 1218, 1220 (f.n. 5). Further, it appeared that the United States Attorney was very careful

to make sure that Bonacorsa, had read his prior deposition and that everything he said there had been said truthfully and accurately. We have no such testimony in the instant case.

In the instant case, appellant was repudiating prior testimony a fact not present in Bonacorsa. Because of this, it was incumbent upon the United States Attorney to take the prior statement of appellant and go through it, line by line, if necessary, to determine which of the things referred to in that prior statement of June 19, were fact and which were not.

Since appellant continued to maintain that the twenty-seven thousand dollar figure had been mentioned to him, it was incumbent upon the United States Attorney to narrow that down so that there could be no ambiguity about what was said at a prior time and no ambiguity as to what was said at the grand jury.

An examination of all of the questions appearing in the indictment reveals similar infirmities. To juxtapose those questions on an ambiguous statement is to ask this court to make one right out of two wrongs.

POINT II

THERE IS NO PROOF
THAT APPELLANT'S
STATEMENTS WERE
RELEVANT TO THE
PURPOSE OF THE
GRAND JURY

This court has previously stated that in grand jury proceedings, as contrasted with adjudicative proceedings:

The scope of legitimate inquiry is...broad, and materiality of testimony may more readily appear than a proceeding whose dimensions are established at the outset.

U.S.A. v. Mancuso, 48 F 2d 275,
281 (f.n. 17).

However, there must be some core upon which the grand jury is in fact centered. In the instant case, we do not know whether this particular episode, involving Mr. Moschiano, was the mainstream of the investigation or was in fact some remote and intermittent trickle not even rising to the significance of even a tertiary branch^{off} of the major investigation.
^

Merely saying that something is material does not make it material. Although Mr. Baldwin went into some detail, supra, as to what the purpose of the grand jury was, there is no specific elucidation and a close examination of his testimony, supra, does not disclose it.

In the United States v. Doulin, 538 F 2d 466 (CA 2) cert. den. _____ U.S. _____ 97 S. Ct. 256 _____ L.Ed. 2d _____ (1976) this court held:

It is of course true that no grand jury, including those which examine appellant, is granted an unlimited charter. Its powers are ultimately "subject to the supervision of a judge,"

Branzburg v. Hayes, 408 U.S. 665, 688, 92 S. Ct. 2646, 2660, 33 L.Ed. 2d 626 (1972).

. . . .

The Congressional decision to restrict the coverage of section 1623 to "false material declaration[s]" thus reflects an accommodation of two competing values: It is designed to give the

grand jury the latitude
necessary to perform a
salutary role while at
the same time safe-
guarding the right to
the individual against
state encroachment.

538 F 2d 466, 469-470

By failing to indicate what the specific
nature of the investigation was as related to
Mr. Moschiano, it cannot be said that Mr.
Moschiano's rights have been protected, and
the conviction must be reversed. Merely
saying that something is material does not
make it material.

POINT III

THE COURT COMMITTED
ERROR WHEN IT PERMITTED
THE JURY TO SEPARATE

On Thursday, December 30, 1976, the jury
began its deliberations at 5:10 P.M. At 9:26,
some four hours later, the jury had testimony
read back to it and recessed at 9:55 P.M. At

10:47 P.M., the court, over objection, dismissed the jury until Tuesday, January 4, 1977. The jury was not asked if they were close to a decision and they were separated for four days, over a major holiday before they returned to deliberate and reach their verdict.

The appellant contends that this period of time is far in excess of anything that it had ever sanctioned in cases such as United States v. Siragusa, 450 F 2d 592, (CA 2 1971) cert. den. 405 U.S. 974 S. Ct. ____ L.Ed. 2d ____ (19 72).

In that case, the jury was permitted to separate for two days.

In United States v. Breland, 376 F 2d 721 (CA 2 1967), the court had only separated the jury overnight.

In the instant case, the jury had not indicated that it was hopelessly deadlocked and there was no application by defense counsel for the jury's separation.

It is true that the case was not one which had a great deal of notoriety. However, the length of jury separation was excessive considering the fact that it was over the New Year's holiday.

POINT IV

THE DECISION OF THE
LOWER COURT OUGHT
TO BE REVERSED AND
THE INDICTMENT DIS-
MISSED OR A NEW TRIAL
ORDERED

Respectfully submitted,

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Affidavit of Service

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

April 8, 1977

The Daily Record

Re: UNITED STATES OF AMERICA VS. SAMUEL MOSCHIANO

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Robert J. Hirsch, Esq.

Attorney(s) for

Appellant

On April 8, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☒ Appendix
of the above entitled case addressed to:

L. GEORGE PARRY, ESQ.
Organized Crime & Racketeering Strike Force
921 Genesee Building
1 West Genesee Street
Buffalo, New York 14202

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 8th day of April 1977

William J. King

Notary Public

Commissioner of Deeds